



MINNESOTA LAWYER

QUARTERLY SPECIAL FOCUS

IN-HOUSE COUNSEL

Investigating corporate misconduct

Management has a duty to fully investigate all allegations of wrongdoing – here are some key points to consider.

By William Michael

Allegations of misconduct are not limited to multinational corporations, nor do they limit themselves to any one particular industry.

Accordingly, investigations of misconduct have become standard practice for businesses of every size. Certainly not every circumstance requires an investigation. However, companies are expanding their use, and the more prevalent investigations become in the corporate world, the more they are expected.

Management has a duty to reasonably respond to allegations of wrongdoing by fully investigating the allegations and by considering any pertinent information that can be gathered.

Assess the allegation

The seriousness of the allegation may dictate the required level of attention.

Often the initial allegation will lack the necessary detail to make a proper determination of its potential seriousness, so an initial investigation may be required. A member of management may conduct this initial investigation, and if the circumstances dictate, a more formal investigation can be undertaken later.

Depending on the nature of the allegation and the potential consequences if true, protection of the company and its management may well require that an investigation occur.

Directors and officers can be held civilly liable for their mere failure to investigate criminal misconduct. Management may face liability if they “recklessly reposed confidence in an obviously untrustworthy employee, has refused or neglected cavalierly to perform [their] duty ... or has ignored either willfully or through inattention obvious danger signs of employee wrongdoing.”

A full investigation will allow for informed decisions regarding potential adverse consequences, determinations on how to minimize potential damage and what actions are appropriate under the circumstances.

To ensure immunity from civil liability under the business judgment rule, management must conform their actions to the same level of care as an ordinarily prudent person in a like position would exercise under similar circumstances.

The business judgment rule only protects informed decisions. An informed decision is defined as one in which management has availed themselves of all material information reasonably available. Thus, when informed of allegations of misconduct, management must act with due care by implementing appropriate procedures, which

may include a full investigation.

Triage the circumstances

Depending upon the nature of the allegation and the potential impact, management must immediately be cognizant of several important considerations.

If the company has public filings, the due date and details of those filings must be considered, as some mention of the allegation or investigation may be warranted.

Additionally, if the allegations are material to the financial status of public reports or the accuracy of underlying documentation for bank loans, the need to immediately assess the accuracy of the allegations may be crucial. If the allegation suggests that the problem is of an ongoing nature, steps may need to be taken to “stop the bleeding” and negate further problematic activity.

Minor allegations can usually be resolved with minimal effort. However, if the allegation is serious, it may be necessary to ensure that the corporation has the necessary documentation to later support any action undertaken.

This written record, if created, should set forth sufficient detail to identify the nature of the allegation, the investigative process employed and any steps taken to resolve the allegations. Additionally, this written record should be maintained in a fashion that ensures it will remain confidential and privileged, and will not be subject to discovery in later litigation.



William Michael



Management must set out the appropriate scope of the investigation

Misconduct | From Page S-1

However, since discovery of these investigative matters is becoming more prevalent, legal opinions and advice may not be included in any written report, lest they be required to be disclosed to third parties.

Conducting the investigation

The independence of the investigation is crucial, as is its perception of independence, to ensure that there is a fair determination of the facts and an appropriate recommendation concerning any course of action.

Improper influence of the process, or perceived conflicts of interest by the investigator, can destroy the credibility of the investigation and may result in further potential liability. This perception is often a key consideration in determining who should conduct the investigation, as is the expertise that can be brought to the investigation.

When an investigation is initiated, determining the facts becomes crucial. These facts then must be analyzed in relation to any relevant company policies, regulations or statutes to assist management in determining what action, if any, is appropriate.

Personal interviews are an essential method of determining relevant facts in any investigation, and interviews provide an opportunity to rebut inaccurate allegations. To the extent practical, the use of hearsay should be minimized, as hearsay negatively impacts the reliability of information.



Assess the allegation



Triage



Conducting the investigation



Timing



Privilege



Disclosure

At the outset of the interview, the witness must be informed that the investigative team represents the company and not the individual. This notification is crucial if the investigation

includes attorneys — either in-house or outside counsel — to ensure that the witness does not mistakenly believe that he or she has an individual attorney-client relationship with the investigative team, which can complicate the later use of such information.

Detailed notes should be taken to provide an accurate recitation of the interview. If an individual is alleged to have committed misconduct, confronting them with the evidence and providing them with an opportunity to rebut the allegations and evidence, and will be perceived as a reasonable and fair procedure.

The fact-gathering process may also include obtaining and reviewing electronic data.

Electronic evidence often serves as a record of who created, edited, viewed, forwarded and received relevant documents. Depending upon the nature of the investigation, maintaining original documents and a chain of custody may also be important, as these may be relevant considerations in later

civil or criminal proceedings.

Often, an information systems expert must be employed for the retention, collection, imaging and organization of electronic documents. The retention of relevant documents is necessary, as often there are either government investigations or civil litigation underway that parallels the internal investigation.

Inadvertent spoliation of electronic information can have drastic conse-



MINNESOTA LAWYER

IN-HOUSE COUNSEL QUARTERLY SPECIAL FOCUS

Management must set out the appropriate scope of the investigation

Misconduct | From Page S-2

quences, both to the investigative results as well as to any potential litigation. Accordingly, sufficient expertise in this technical area is essential.

While documents may provide independent corroboration for the investi-

The independence of the investigation is crucial, as is its perception of independence, to ensure that there is a fair determination of the facts and an appropriate recommendation concerning any course of action.

gation, they may also have been falsely created for the purpose of exculpating individuals. Accordingly, an analysis of the metadata surrounding the creation of electronic documents may be necessary.

Timing and privilege

Each investigation will have differing requirements regarding timing, scope, staffing and methods. These four matters are crucial to the success of any investigation and must be discussed at the outset, with the understanding that they may change as more information is uncovered.

Generally, when courts have reviewed investigations to determine appropriateness, they have favored immediacy and have used this as a factor in their determination as to whether a reasonable and thorough

approach was undertaken.

Additionally, the earlier the investigation is initiated, the more likely any continuing misconduct can be halted.

There are several considerations in determining when to initiate the investigation. These include the overall scope of the investigation that will be necessary, the logistics involved and the availability of key witnesses. If the investigation is not initiated immediately, management should be prepared to justify the delay, should there ultimately be oversight by the courts.

It is crucial that management set out the appropriate scope of the investigation so that decisions will be based upon a thorough analysis of all relevant circumstances. Additionally, the company may subject itself to further litigation if the investigation is not performed properly and thoroughly.


The investigative steps required in any investigation will determine the appropriate composition of investigators. Minor allegations may require only the services of the compliance officer, human resources officer or in-house counsel, while serious allegations or potential conflicts of interest may dictate that outside counsel is consulted.

Additionally, technical issues may necessitate that experts familiar with the specific technicalities are employed.

A key consideration is the potential privilege issues that may need to be addressed. Generally, an investigation conducted by outside counsel will be privileged, while one conducted by company employees will not survive a challenge.

When an investigation is conduct-

Generally, when courts have reviewed investigations to determine appropriateness, they have favored immediacy and have used this as a factor in their determination as to whether a reasonable and thorough approach was undertaken.

ed by in-house counsel or by company employees overseen by in-house counsel, the privilege issues become more complicated, with the privilege conclusion being very fact dependent. 

William Michael is a partner with Dorsey & Whitney law firm in Minneapolis and a former federal prosecutor for the Southern District of Florida and the District of Minnesota.

Reprinted with permission of
Minnesota Lawyer.

For subscription information,
please call 800-451-9998.

Story ideas should be directed to
the editor at 612-584-1531.

MINNESOTA LAWYER